IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-116

THE OKLAHOMA PUBLISHING COMPANY, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

1. The *United States* v. *Powell* Issue.

The Court of Appeals erred fundamentally in denying OPUBCO a hearing on the bad faith issue and this error is apparent in the manner the EEOC's Brief in Opposition deals with the dilemma in which the Commission finds itself. At first, the Commission suggests that the Court of Appeals, by considering certain unique circumstances, denied the requested

hearing by a decision "limited to the particular facts of this case" (EEOC Brief, p. 6) and did not render a decision in conflict with *United States* v. *Powell,* 379 U.S. 48, 57-58 (1964).

Nothing could be farther from the case. Rather than distinguishing *Powell* by a close reading of certain facts, the Court of Appeals, in straight forward and categorical fashion, held that OPUBCO must await the completion of the entire EEOC administrative investigation before any hearing on its claims could be had. Rather than considering any facts as unique, the case was treated as routine and no attempt was made to distinguish *Powell.* Indeed, *Powell* was never mentioned. Certiorari Petition, 30a-33a, 36a-37a.

Moreover, it is noteworthy that the Commission's brief makes no attempt to supply those "peculiar facts". This failure is perfectly consistent with the Commission's position taken earlier in this litigation in which the Commission argued that OPUBCO should be permitted a hearing on its claims once investigation of the charges reached the subpoena enforcement stage. EEOC Brief, pp. 5-16, U.S. Court of Appeals for the Tenth Circuit, No. 74-1676. Thus, rather than seeking to delay, OPUBCO's opposition to subpoena enforcement was precisely in keeping with the Commission's suggestion.

Next, the Commission argues that OPUBCO's "claims could more efficiently be considered at the close of the administrative process than at the beginning" (EEOC Brief, p. 6) and that OPUBCO will suffer no real harm because of the deferral (*Id.* at p. 7). First, it could hardly be more efficient to conduct an entire and lengthy investigation and follow it by the sought hearing when establishment of OPUBCO's claims at the hearing would bar the conduct of the investigation.[1]

Of far more importance is that OPUBCO, by its claim, seeks to avoid having to undergo an investigation motivated only by a desire to punish and harass OPUBCO. Of what utility is the hearing after OPUBCO has been compelled to endure that which success at the hearing is designed to avoid? *Powell* and its progeny stand for the proposition that a court's process is not to be abused and it is enforcement of the Commission's subpoena that is claimed to constitute the abuse. If no hearing can be had on this claim until after the subpoena is enforced and other equally infected aspects of the investigation are endured, no *post hoc* finding sustaining OPUBCO's claims can undo the abuse of the court's process or vindicate OPUBCO's right to be free of such abuse.[2]

Finally, the Commission does not challenge the ongoing viability of *Powell* and it concedes, as it must, that the Court of Appeals did not find that OPUBCO's

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[1] It is not clear whether the Commission's "efficiency" argument signals that it has abandoned the exhaustion of administrative remedies doctrine upon which the lower courts appeared to base their decisions. We note, however, that the Commission has made no effort to support the Court of Appeals' decision on this ground. As noted in OPUBCO's Petition herein (pp. 10-11), such an abandonment would be appropriate. *Public Utilities Commission* v. *United States,* 356 U.S. 534, 540 (1958); *Mancusi* v. *De Forte,* 392 U.S. 365, 371 (1968).

[2] In any event, questionable efficiency appears a hardly sufficient justification in the face of a substantial constitutional claim. As in the criminal context, the mere provision of a subsequent hearing at which constitutional injury may be sought to be undone does not justify ignoring the earlier claim that such injury likely will occur.

claims were insufficient to warrant a *Powell* hearing. It nevertheless argues that OPUBCO's showing in fact was inadequate (EEOC Brief, pp. 5-6, n.6). Reluctantly, however, the Commission noted that an undenied threat of a Commission proceeding against OPUBCO in retaliation for refusing to settle an earlier case was followed by the commissioner's charges. The Commission neglected the other matters substantiating OPUBCO's claim and, without detailing them,[3] it should be asked what showing is more substantial than a threat come to fruition? Moreover, the showing made by OPUBCO was at least as substantial as any made in those cases in which courts have required *Powell* hearings. *Powell* requires only that a subpoena respondent raise "a substantial question that judicial enforcement of the administrative summons would be an abuse of the court's process". 379 U.S. at 51. *Powell* does not require ultimate proof of the claim, that being the burden to be carried at the hearing by testimony and any appropriate discovery in aid of the proof.[4]

2. The *Marshall* v. *Barlow's Inc.* Issue.

In support of its claim that *Barlow's* is irrelevant, the Commission notes that Title VII does not permit unconsented entry or inspection without a court order and that the *Barlow's* situation, unlike that presented here, was one in which no provision for judicial review of agency inspection action existed (EEOC Brief, p. 8). Thus, it is said that *Barlow's* is irrelevant.[5] All of the foregoing is beside the point. The question presented here is not whether judicial review is or is not available; rather, the question is as to what standards must the Commission be held when seeking enforcement of its subpoena?[6]

Barlow's answered this question in the OSHA context by requiring the agency to demonstrate that its purpose in inspecting was in keeping with a "general administrative plan for enforcement" or was based on probable cause to believe the Act was being violated. The former test could be satisfied merely by showing that an employer's premises routinely were scheduled for inspection. It is not a substantial burden and would not be a substantial burden for the Commission in Title VII litigation.[7] Yet the Commission appears to argue that no showing beyond the fact of a commissioner's charge is necessary in order to validate an investigation of it by subpoena.

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[3] See Certiorari Petition herein, pp. 12-14, 38a-46a.

[4] OPUBCO hardly can be faulted, as the Commission attempts (EEOC Brief, p. 2, n. 2), for failing to adduce all evidence necessary to prove its claims before the District Court when available evidence not yet produced is in the possession of the Commission alone and some discovery will be required to extract it. *United States* v. *Satter*, 432 F.2d 697 (1st Cir. 1970); Rule 81(a), Federal Rules of Civil Procedure.

[5] The Commission also argues that the filing of the constitutional challenge in the District Court, was merely a bald attempt to avoid the effect of the stay request denied in the subpoena case. To the contrary, OPUBCO's constitutional challenge following subpoena enforcement was precisely the conduct followed in *Barlow's* (where no appeal was taken from the enforcement order) and such conduct was conceded to be proper by the government. 98 S.Ct. at 1819, n. 4.

[6] The Commission's distinctions are inaccurate. Unconsented entry absent a court order is permitted in neither the OSHA nor Title VII context. *Compare* 42 U.S.C. § 2000e-8(a), 9 *and* 29 U.S.C. § 161 *with* 29 U.S.C. § 657(a).

[7] Significantly, the Commission does not assert that the application of *Barlow's* criteria to its investigative efforts would impede them in the slightest. Moreover, a requirement of some showing of "probable cause" is hardly "long discredited." *See* v. *City of Seattle*, 387 US. 541, 544-45 (1967).

This approach stands *Barlow's* on its head. It is akin to arguing that an OSHA inspector may demand admittance simply by showing his credentials and an internally generated piece of paper from the agency instructing him to inspect. However, this is precisely the argument rejected by this Court in *Barlow's.*[8]

The reason that an individual's sworn charge claiming a Title VII violation as to himself is sufficient to establish the Commission's right to investigate is that it is purely a matter of routine[9] from the Commission's point of view. It is the manner contemplated by the Act by which an investigation would commence and proof of the existence of that charge, without proof of its allegations, would be the affirmative showing contemplated by *Barlow's* requirement that the agency be proceeding in accordance with its "general administrative plan for enforcement."

Commissioner's charges are another matter. They are not routine, they are wholly internally generated, and the Commission cannot point to some outside source with whom it is not associated and claim that the charge emanated from that source with the Commisssion's action merely being a routine response.

[8] An unadorned commissioner's charge should stand in no better position than similar statements previously rejected by this Court. *Mancusi* v. *DeForte*, 392 U.S. 364, 371 (1968); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391 (1920). This is especially the case when Commissioner Walsh had to admit that the dates, places, and circumstances of the alleged violations supporting her charges were "unavailable" to her. *See* Certiorari Petition herein, p. 13.

[9] These charges constitute the overwhelming majority of the Commission's activity and invariably are brought without prior involvement by the Commission.

Whether generated by one of its district offices as is likely in this case or whether developed within its Washington, D. C. headquarters, a commissioner's charge emanates from within and, as Commissioner Walsh claims, frequently is based on some facts constituting reasonable cause to believe the charge may be true.

It is not too much to require the Commission to adduce at a hearing the matters upon which it relies for investigating especially when a subpoena respondent has fairly raised the question of the Commission's right to proceed. The Commission need not prove that a violation of the Act has occurred or even that all of the matters on which it relies are true, but it must show that there are legitimate factors warranting the commissioner's issuance of the charge. If such a basis exists, it will be a simple matter to demonstate it,[10] and this demonstration is all that *Barlow's* requires.

For these reasons, a writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals.[11]

[10] *E.g.*, proof that an employer met the criteria for inclusion in the Commission's "Systemic Program," or that a charge was requested to provide anonymity or to provide for case consolidation. *See EEOC Compliance Manual*, §§ 3, 16. Contrary to the Commission's suggestion (EEOC Brief, pp. 8-9), OPUBCO does not seek a more specific charge so that it may better defend; rather, it seeks the assurance allowed by *Barlow's* that the Commission's investigation is proper and consistent with the Act.

[11] Although a specific consideration by this Court of the *Barlow's* issues may be required in order flesh out the applicability of that holding to Title VII litigation, the manifest applicability of *Powell* would warrant summary reversal if the Court were to grant the instant Petition only as to the *Powell* issues. On remand, the *Barlow's* issues could be addressed.

Respectfully submitted,

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